Dynamic Plantations Bhd v YB Menteri Sumber Manusia & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–30 OF 2002 AND W-01–31 OF 2002
JAMES FOONG, ZAINUN ALI AND AHMAD MAAROP JJCA
5 AUGUST 2008

Administrative Law — Judicial review — Application for — Decision by Minister of Labour and Manpower ('Minister') to refer trade dispute to Industrial Court — Whether Minister's decision to refer non-conclusion of collective agreement as trade dispute was a nullity — Whether second respondent had sought or obtained recognition from appellant to commence collective bargaining — Whether appellant by its conduct recognised second respondent — Industrial Relations Act 1967 ss 9, 17 & 18

The appellant, a public listed company which owns palm oil and rubber plantations, was a member of Malayan Agriculture Producers Association ('MAPA'), a trade union of employers, from 1983 to 23 May 2000. The second respondent is a trade union of employees for plantation workers. MAPA negotiated and concluded collective agreements with the second respondent concerning working terms and conditions for estate workers generally and since the appellant was a MAPA member those terms and conditions applied to those employees working for the appellant. There were five successive collective agreements entered into between MAPA and the second respondent but after the expiry of the last collective agreement on 31 December 1999, the parties did not enter into a new collective agreement. On 18 April 2000, the second respondent wrote to the appellant to request a commencement of negotiation for a new collective agreement to replace the one which had expired. However, on 12 June 2000 the appellant, who was no longer a member of MAPA, wrote to the second respondent rejecting their request to commence collective bargaining on the grounds that the appellant had not granted the second respondent recognition as required under the Industrial Relations Act 1967 ('the Act'). Dissatisfied with the appellant's stand the second respondent referred the matter to the Industrial Relations Department for appropriate action under s 18(1) of the Act. As the parties were unable to arrive at an agreement the matter was referred to the Minister of Labour and Manpower ('the first respondent') who in turn decided to refer the dispute to the Industrial Court as a 'trade dispute'. The appellant thereafter applied to the High Court for a judicial review of the first respondent's decision and sought an order for certiorari to quash that

decision. The High Court dismissed the appellant's application and held, inter alia, that the appellant had never raised the issue of recognition of the second respondent during the entire period of the collective agreements between MAPA and the second respondent but had instead by its past conduct implied that it had recognised the second respondent. This was the appellant's appeal against that decision. The appellant submitted that since the second respondent had neither sought nor obtained recognition from the appellant under s 9 of the Act, there was no question of a trade dispute having arisen between the parties over their failure to conclude a collective agreement. As such the appellant contended that there was no trade dispute for the first respondent to refer to the Industrial Court. The appellant further maintained that the collective agreements that existed in the past between the parties were only good until the next collective agreement and did not as such confer recognition upon the second respondent in respect of the new collective agreement that the second respondent was attempting to initiate. The main issue for determination in this case was whether the first respondent was right in referring the non-conclusion of a collective agreement between the appellant and the first respondent as a trade dispute to the Industrial Court when the second respondent had not sought or obtained recognition from the appellant to commence collective bargaining.

Held, dismissing the appeal with costs:

(1) (per **James Foong JCA**, **Ahmad Maarop JCA** concuring) The past collective agreements during the appellant's tenure of membership with MAPA were negotiated and entered into by MAPA on behalf of the appellant and the appellant was expressly named as a consenting member of MAPA in those collective agreements. In addition, the parties had entered into not just one collective agreement but a series of five in succession, each after the previous term had expired and replaced by a new collective agreement. Therefore, although the second respondent had not sought recognition from the appellant under s 9 of the Act, the appellant had by its conduct recognised the second respondent as a trade union of its employees for that category of work and could not now refute its stand (see paras 23 & 24).

(2) (per **James Foong JCA**, **Ahmad Maarop JCA** concuring) In normal situations the requirements of s 9 of the Act may be complied with but in the present instance since the employer had by his conduct previously recognised the second respondent, the formalities of s 9 of the Act are considered fulfilled. In addition, the word 'may' appearing in s 9(2) of the Act allows a certain degree of flexibility for a trade union to be recognised (see paras 25 & 26).

(3) (per **James Foong JCA**, **Ahmad Maarop JCA** concuring) Further, the issue of recognition may not necessarily arise since art 2 part I of the collective agreement provides for the agreement to run 'until superseded by a new collective agreement'. Such an arrangement is also permitted under s 17(2) of the Act. Therefore, as there was no new subsequent collective agreement, the previous agreement continued to be in force and the question of the second respondent not being recognised did not arise (see paras 7 & 27).

(4) (per **James Foong JCA**, **Ahmad Maarop JCA** concuring) While the appellant was a member of MAPA, the latter was only acting as the agent of the appellant. Thus as principal the appellant had held itself out to recognise the second respondent. When the appellant was no longer a member of MAPA, it had dismissed MAPA as its agent but the collective agreement continued to bind the principal. Therefore the appellant could not now allege that it did not recognise the second respondent (see para 28).

(5) (per **Zainun Ali JCA** dissenting) There was no evidence whatsoever to suggest that the second respondent had sought or been granted recognition under s 9 of the Act. As a direct consequence of the non-application and non-granting of recognition of the second respondent by the appellant, the second respondent was precluded from engaging in any collective bargaining and therefore it could not consider the inability of concluding a collective agreement as a trade dispute. Thus any consequent steps taken such as the Minister's decision to refer the matter as a trade dispute was premature since there could never be such a trade dispute in the proper standing of the parties. Thus the Minister's decision was a nullity and the trial judge's findings in this respect amounted to a misdirection (see paras 36, 44–45).

(6) (per **Zainun Ali JCA** dissenting) Whilst the predecessor agreements continue to bind the appellant, they did not ipso facto, conferred recognition status on the second respondent, necessary such as to vest it with the legal capacity to issue an invitation to engage in collective bargaining to the appellant outside the MAPA framework. Even if the appellant remained a MAPA member, MAPA would only be able to represent it for a collective agreement if the appellant authorised it to do so (see paras 56 & 58).

[Bahasa Malaysia summary

Perayu, sebuah syarikat awam yang disenaraikan dalam Bursa Saham Kuala Lumpur ('BSKL') yang memiliki ladang kelapa sawit dan getah, adalah ahli Malayan Agriculture Producers Association ('MAPA'), suatu kesatuan sekerja majikan-majikan, dari tahun 1983 ke 23 Mei 2000. Responden kedua adalah

kesatuan sekerja pekerja-pekerja ladang. MAPA membuat rundingan dan memutuskan perjanjian bersama dengan responden kedua mengenai terma-terma dan syarat-syarat bekerja bagi pekerja estet secara am dan memandangkan perayu adalah ahli MAPA terma-terma dan syarat-syarat tersebut terpakai kepada pekerja-pekerja yang bekerja untuk perayu. Terdapat lima perjanjian bersama lanjutan yang dimasukkan di antara MAPA dan responden kedua tetapi selepas tamat perjanjian bersama pada 31 Disember 1999, pihak-pihak tidak memasuki perjanjian bersama yang baru. Pada 18 April 2000, responden kedua menulis kepada perayu memohon untuk memulakan perbincangan untuk satu perjanjian bersama yang baru untuk menggantikan yang telah tamat. Walau bagaimanapun, pada 12 Jun 2000 perayu, yang bukan lagi menjadi ahli MAPA, menulis kepada responden kedua menolak permohonan mereka untuk memulakan penawaran bersama dengan alasan perayu tidak memberikan pengiktirafan kepada responden kedua seperti yang diperlukan di bawah Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Tidak berpuashati dengan pendirian perayu responden kedua merujuk perkara tersebut ke Jabatan Perhubungan Perusahaan bagi tindakan yang sepatutnya di bawah s 18(1) Akta tersebut. Memandangkan pihak-pihak tersebut tidak mencapai kata sepakat, perkara tersebut dirujuk kepada Menteri Sumber Manusia ('responden pertama') yang seterusnya memutuskan untuk merujuk pertelingkahan tersebut ke Mahkamah Perusahaan sebagai 'pertikaian perdagangan'. Perayu kemudiannya memohon kepada Mahkamah Tinggi untuk satu semakan kehakiman terhadap keputusan responden pertama dan memohon satu perintah certiorari untuk membatalkan keputusan itu. Mahkamah Tinggi menolak permohonan perayu dan memutuskan, antara lain, bahawa perayu tidak pernah membangkitkan isu pengiktirafan responden kedua semasa keseluruhan tempoh perjanjian bersama di antara MAPA dan responden kedua tetapi sebaliknya melalui tindakan sebelumnya membayangkan ia telah mengiktiraf responden kedua. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu menghujahkan bahawa memandangkan responden kedua tidak memohon ataupun memperolehi pengiktirafan daripada perayu di bawah s 9 Akta tersebut, tidak terdapat persoalan pertikaian perdagangan yang berbangkit di antara pihak-pihak tersebut ke atas kegagalan mereka untuk menamatkan satu perjanjian bersama. Oleh itu perayu berhujah bahawa tidak terdapat pertikaian perdagangan untuk responden pertama merujuk kepada Mahkamah Perusahaan. Perayu seterusnya mempertahankan bahawa perjanjian bersama yang wujud sebelum ini di antara pihak-pihak tersebut hanya berguna sehingga perjanjian bersama berikutnya dan oleh itu tidak menganugerahkan pengiktirafan kepada responden kedua ke atas perjanjian bersama yang baru yang responden kedua sedang mencuba untuk memulakan. Isu utama untuk ditentukan di dalam kes ini adalah sama ada responden pertama betul dalam merujuk ketidaksudahan perjanjian bersama di antara perayu dan responden pertama sebagai pertikaian perdagangan kepada Mahkamah Perusahaan apabila responden kedua tidak memohon

atau memperolehi pengiktirafan daripada perayu untuk memulakan penawaran bersama. A

Diputuskan, menolak rayuan dengan kos: B

(1) (oleh **James Foong HMR**, **Ahmad Maarop HMR** bersetuju) Perjanjian bersama terdahulu semasa tempoh keahlian perayu dengan MAPA telah dibincangkan dan dimasukkan oleh MAPA bagi pihak perayu dan perayu secara nyata dinamakan sebagai ahli bersetuju C MAPA di dalam perjanjian bersama tersebut. Selanjutnya, pihak-pihak tersebut telah memasuki bukan satu perjanjian bersama tetapi satu siri lima berturutan, setiap satu selepas terma yang sebelumnya telah tamat dan digantikan dengan satu perjanjian bersama yang baru. Oleh itu, walaupun responden kedua tidak memohon pengiktirafan daripada D perayu di bawah s 9 Akta tersebut, perayu melalui tindakannya mengiktiraf perayu kedua sebagai kesatuan sekerja pekerja-pekerjanya bagi bahagian kerja tersebut dan tidak boleh kini menyangkal pendiriannya (lihat perenggan 23 & 24).

E

(2) (oleh **James Foong HMR**, **Ahmad Maarop HMR** bersetuju) Dalam situasi biasa keperluan s 9 Akta tersebut mungkin akan dipatuhi tetapi di dalam kes ini memandangkan majikan telah dalam tindakannya sebelum ini mengiktiraf responden kedua, perkara-perkara rasmi F berkenaan s 9 Akta tersebut dikira telah dipenuhi. Selanjutnya, perkataan 'mungkin' yang terdapat dalam s 9(2) Akta tersebut membenarkan satu peringkat tertentu keanjalan untuk satu kesatuan sekerja diiktiraf (lihat perenggan 25 & 26).

(3) (oleh **James Foong HMR**, **Ahmad Maarop HMR** bersetuju) G Seterusnya, isu pengiktirafan mungkin tidak perlu berbangkit kerana artikel 2 bahagian I daripada perjanjian bersama memperuntukkan perjanjian tersebut berlangsung 'sehingga diambil alih oleh perjanjian bersama baru'. Penyusunan sedemikian juga dibenarkan di bawah H s 17(2) Akta tersebut. Oleh itu, memandangkan tidak terdapat perjanjian bersama yang seterusnya, perjanjian yang sebelumnya terus berkuat kuasa dan persoalan mengenai responden kedua tidak diiktiraf tidak berbangkit (lihat perenggan 7 & 27).

(4) (oleh **James Foong HMR**, **Ahmad Maarop HMR** bersetuju) Semasa I perayu adalah ahli MAPA, MAPA hanya bertidak sebagai ejen perayu. Oleh itu sebagai prinsipal perayu telah membuat pendirian untuk mengiktiraf responden kedua. Apabila perayu tidak lagi menjadi ahli MAPA, ia telah melucutkan MAPA sebagai ejennya tetapi perjanjian

bersama tersebut terus mengikat prinsipal. Oleh itu perayu tidak boleh kini mendakwa ia tidak mengiktiraf responden kedua (lihat perenggan 28).

(5) (oleh **Zainun Ali JCA** menentang) Tidak terdapat bukti untuk mencadangkan responden kedua telah memohon atau diberikan pengiktirafan di bawah s 9 Akta tersebut. Sebagai akibat langsung terhadap tiada permohonan dan tiada pemberian pengiktirafan responden kedua oleh perayu, responden kedua dikecualikan daripada terlibat dalam mana-mana penawaran bersama dan oleh itu ia tidak dapat mempertimbangkan ketidakupayaan untuk menamatkan perjanjian bersama sebagai satu pertikaian perdagangan. Oleh itu sebarang langkah lanjutan seperti keputusan Menteri untuk merujuk perkara tersebut sebagai pertikaian perdagangan adalah prematang memandangkan ia tidak mungkin terjadi pertikaian perdagangan sedemikian di dalam keadaan betul pihak-pihak terlibat. Oleh itu keputusan Menteri adalah terbatal dan keputusan hakim bicara dalam perkara ini merupakan salah arahan (lihat perenggan 36, 44–45).

(6) (oleh **Zainun Ali JCA** menentang) Memandangkan perjanjian-perjanjian terdahulu terus mengikat perayu, ia tidak ipso facto, memberikan status pengiktirafan kepada responden kedua, perlu seperti memberikannya keupayaan undang-undang untuk mengeluarkan satu jemputan untuk terlibat dalam penawaran bersama kepada perayu di luar rangka kerja MAPA. Walaupun perayu kekal sebagai ahli MAPA, MAPA hanya boleh mewakilinya untuk satu perjanjian bersama jika perayu memberi kuasa kepadanya untuk melakukannya (lihat perenggan 56 & 58).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

Cases referred to

All Malayan Estate Staff Union v Malayan Producers Association [1982] CLJ 362 (refd)

Dynamic Management Sdn Bhd v Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat [1981] 2 ILR 237 (refd)

Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Bhd v Perbadanan Perkapalan Antarabangsa Malaysia Bhd [2007] 2 ILR 686 (refd)

Malaysia Shipyard and Engineering Sdn Bhd TR1–25–31–981, unreported (refd)

Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd [1976] 2 MLJ 67, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 9, 9(2), (3)(a), 12, 13, 13(1), (7), 17, 17(2), 18, 18(1), 26(2), Part III, Part IV
Trade Unions Act 1959 s 12

Appeals from: Application for Judicial Review No R2–25–97 of 2000 (High Court, Kuala Lumpur)

CS Kumar (YC Chin with him) (Kumar Partnership) for the appellant.
Shamsurryati Shamsuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the first respondent.
B Lobo (Lobo & Associates) for the second respondent.

James Foong JCA (delivering majority judgment):

INTRODUCTION

[1] These two appeals were heard together and it was agreed by all parties that the decision in Appeal No W-01–30 of 2002 will bind appeal No W-01–31 of 2002.

BACKGROUND

[2] The appellant is a public listed company which owns palm oil and rubber plantations and was a member of an employer trade union known as Malayan Agriculture Producers Association ('MAPA') since 1983. It ceased to be a member on 23 May 2000.

[3] The second respondent is a trade union of employees for plantation workers.

[4] When the appellant was a member of MAPA, MAPA negotiated and concluded collective agreements with the second respondent concerning working terms and conditions for estate workers generally. These terms and conditions applied to those employees working for the appellant.

[5] There were five successive collective agreements entered into between MAPA and the second respondent. The last was dated 30 January 1997.

[6] Article 1 of this collective agreement declares:

> The parties bound by this Agreement are member companies of MAPA specified in Appendix A ...

A And in appendix A, the appellant's name appears.

[7] This collective agreement was for a period of three years ending 31 December 1999. However, Article 2 of Part 1 of this agreement states:

B > This Agreement shall come into force with effect from 1st January, 1997 (the 1st day of the month in which the Agreement is concluded) and shall continue to remain in force for a period of three (3) consecutive years and thereafter until superseded by a new collective agreement or an Award of the Industrial Court.

C [8] On 18 April 2000, the second respondent wrote to the appellant requesting commencement of negotiation for a collective agreement on wages and terms and conditions for the harvesters employed in the plantations owned by the appellant.

D [9] The appellant on 8 May 2000 rejected this request of the second respondent to commence collective bargaining on the ground that the appellant has not granted recognition to the second respondent under s 9 of the Industrial Relations Act 1967 ('the Act').

E [10] Then on 23 May 2000, the appellant ceased to be a member of MAPA.

F [11] Dissatisfied, with the appellant's contention, the second respondent informed the appellant that it will refer the matter to the Industrial Relations Department for appropriate action under s 18(1) of the Act.

G [12] Pursuant to a request by the second respondent, the Industrial Relations Department invited the appellant and the second respondent to a conciliatory meeting on 7 July 2000. But due to the appellant's insistence that the second respondent has not been recognised by the appellant, no agreement between the parties was reached.

H [13] On 29 August 2000, the Director-General of Industrial Relations informed the appellant and the second respondent that the Minister of Labour and Manpower (the first respondent), has decided to refer the dispute to the Industrial Court under s 26(2) of the Act.

I [14] On hearing this, the appellant applied by to the High Court for judicial review of the first respondent's decision and for certiorari to quash it.

[15] After hearing, the High Court on 22 April 2002 dismissed the appellant's application; thus this appeal to us.

GROUNDS OF THE HIGH COURT

[16] Briefly, the grounds proffered by the High Court in refusing the appellant's application are these:

(1) The appellant has never raised the issue of recognition of the second respondent during the entire period of the collective agreements entered into between the MAPA and the second respondent and the last agreement is still binding on the appellant.

(2) The past conduct of the appellant in being a member of MAPA and agreeing to be bound by the terms of the collective agreements imply that the appellant has recognised the second respondent.

(3) MAPA was the principal in the collective agreements and the appellant was its agent.

(4) The terms contained in the last collective agreement are still in force.

PRINCIPAL ISSUE

[17] The appellant submitted to us that the principal issue in this case is:

> Whether the Minister had jurisdiction to refer the purported dispute over the refusal by the appellant to negotiate a collective agreement with the second respondent to the Industrial Court for adjudication as a 'trade dispute' under s 26(2) of the Act when the second respondent had not sought nor obtained recognition from the appellant under the provisions of the Act.

THE APPELLANT'S GROUNDS

[18] It is the contention of the appellant that this should be answered in the negative for the simple reason that before the second respondent can invite the appellant to collective bargaining, the second respondent must be first recognised by the appellant.

[19] Section 13(1) of the Act demands this:

> Where a trade union of workmen has been *accorded recognition by an* employe ...
>
> (Emphasis added.)

[20] Since the second respondent has not sought recognition from the appellant and neither has the appellant granted any recognition to the second respondent under s 9 of the Act, a trade dispute over the failure to conclude

a collective agreement could not have arisen to permit the first respondent to refer the dispute to the Industrial Court.

[21] The appellant maintained that those 'past collective agreements during the appellant's tenure of membership with MAPA, did not confer recognition upon NUPW (second respondent) nor was the appellant trying to contest their validity'.

DECISION OF THIS COURT

[22] After hearing submissions in this appeal, by majority (with Justice Datuk Zainun Ali dissenting) we dismissed this appeal with costs.

REASONS OF THE MAJORITY

[23] We agree that though the second appellant has not sought recognition from the appellant under s 9 of the Act but by participating in MAPA as a member and agreeing to be bound by the terms and conditions of the collective agreements, the appellant has by conduct recognised the second respondent as a trade union of its employees for that category of work. One must be reminded that the collective agreements were negotiated and entered into by MAPA on behalf of the appellant. The appellant was expressly named as a consenting member of MAPA in the collective agreements. If the appellant has not recognised the second respondent, why was it prepared to be bound by the terms and conditions of the collective agreements? By these acts and conduct, we consider the appellant has recognised the second respondent as a trade union.

[24] We wish to highlight that there was not just one collective agreement but a series of five in succession, each after the previous term has expired and replaced by a new collective agreement. We find it hard to accept the appellant's argument that though it was bound by such collective agreements at the material time yet it has never recognised the second respondent. If such contention is accepted then it would make a mockery of the concept of acceptance by conduct. We are firm in our view that once the appellant has recognised the second respondent it cannot now turn around to refute it.

[25] We are aware of the requirements in s 9(2) and (3)(a) of the Act which says:

> Section 9(2)
>
> A trade union of workmen *may* serve on the employer or a trade union of employers in writing in the prescribed form a claim for recognition in respect of

the workmen or any class of workmen employed by such employer or by the members of such trade union of employers. A

(Emphasis added.)

Section 9(3)

An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim — accord recognition ... B

[26] Counsel for the appellant has insisted that there must be strict compliance of this section before recognition can be granted to the second respondent. However, we are of the opinion that the word 'may' appearing in s 9(2) of the Act allows a certain degree of flexibility for a trade union to be recognised. As illustrated earlier, the appellant has already recognised the second respondent by entering into a binding agreement with the second respondent without the need to comply with the formality of s 9 of the Act. Of course we agree that in normal situation the requirements of s 9 of the Act must be complied with but where, like in this case, the employer has by conduct previously recognised the second respondent then the formalities of s 9 of the Act are considered fulfilled. C D E

[27] Further, the issue of recognition may not necessary arise. Article 2 Part I of the collective agreement provides for this agreement to run 'until superseded by a new collective agreement or an award of the Industrial Court'. Such an arrangement is permitted under s 17(2) of the Act which reads: F

As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court. G

As there is no new subsequent collective agreement or a decision of the court to vary it, the collective agreement continues to be in force and the question of the second respondent not being recognised does not arise. H

[28] The appellant has persistently argued before us that it has left MAPA as a member and therefore not bound by terms of the collective agreement. However, we are of the view that when the collective agreement was entered into, MAPA was only acting as an agent of the appellant. The appellant was the principal rather than the reverse as found by the High Court. As principal, the appellant has held itself out to recognise the second respondent. The departure of the appellant from MAPA in our view is no more than a I

dismissal of MAPA as an agent of the appellant. After the agent is dismissed, the collective agreement continues to bind the principal. Thus, the appellant cannot now turn round to say that it does not recognise the second respondent.

CONCLUSION

[29] Based on the reasons aforesaid we dismissed this appeal with costs.

[30] YA Dato' Ahmad bin Haji Maarop has read this judgment in draft and agrees with the contents.

Zainun Ali JCA (delivering dissenting judgment):

[31] The issue before us is simply this.

Whether the Minister has jurisdiction to refer the purported dispute over the refusal by the appellant to negotiate a collective agreement with the NUPW to the Industrial Court for adjudication as a '*trade dispute*' under s 26(2) of the Industrial Relations Act 1967 when the second respondent (NUPW) had neither sought nor obtained *recognition* from the appellant as required under the Industrial Relations Act 1967.

Parties at the outset, had agreed that the appeal be heard together with Appeal No W-01–30 of 2002 and that the decision herein will bind the aforementioned appeal.

BACKGROUND FACTS

[32] It is imperative that some preliminaries are emplaced *vis-a-vis* the legal position of employer-employee and trade unionism and collective bargaining in this country. The governing Act is the Industrial Relations Act 1967 and all rights and positions of parties flow from this statutory regime.

Section 13 of the Industrial Relations Act 1967 is the starting point to collective bargaining. In fact it is a pre-condition to doing so.

Section 13 reads as follows:

> Where a trade Union of workmen *has been accorded recognition* by an employer or a trade union of employers.
>
> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or
>
> (b) the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.

The invitation under subsection (1) shall be in writing and shall set out the proposals for a collective agreement. (Emphasis added.)

Thus, before it can even begin inviting the employer to go to the negotiating table, the said trade union of workmen must first be clothed with recognition; otherwise it has no locus to do so.

[33] The process and procedure for seeking recognition is a fundamental safeguard to both employer and employees. Recognition under s 13 accords the employee with legal standing to issue a statutory invitation to commence collective bargaining with the employer and vest it with the right to negotiate terms of employment in a union. This collective bargaining regime enables a trade union (this case, NUPW) to issue a statutory invitation to commence collective bargaining and enables it to ventilate dispute arising therefrom. This is governed by Part IV of the 1967 Act.

[34] The appellant, was a member of the Malayan Agricultural Producers Association ('MAPA') until *23 May 2000*. MAPA is a trade union of employers registered under s 12 of the Trade Unions Act 1959.

[35] MAPA recognises NUPW for collective bargaining purposes, where NUPW could issue statutory invitation to any member of MAPA, to commence collective bargaining under s 12 of the Act. This is done, where a MAPA member (such as the appellant) authorising MAPA (under r 4A of MAPA rules), to negotiate any collective agreement on its behalf. In this regard, MAPA acts as principal, acting on behalf of its member. NUPW does not engage in collective bargaining with such member but only through MAPA.

The appellant had never been a party to any collective agreement directly with NUPW. Nor has NUPW invited the appellant directly for collective bargaining outside of the MAPA framework of negotiations.

[36] More importantly, after the expiry of the last CA ie on 31 December 1999, NUPW had never sought, nor been granted recognition under s 9 of the Industrial Relations Act 1967 at any material time. Section 9 reads as follow:

PART III — RECOGNITION AND SCOPE OF REPRESENTATION OF TRADE UNIONS

Section 9 Claim for recognition.

(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities, that is to say —

(a) managerial capacity;

A (b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

B may seek recognition or serve an invitation under s 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General C by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

D (1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in E writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned —

[1 B, C, D Ins, Act A 1322: s 8]

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for F recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

[Subs. Act A1322: s 8]

(3) An employer or a trade union of employers upon whom a claim for recognition G has been served shall, within twenty-one days after the service of the claim —

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition.

H [Am. Act A1322: s 8]

(3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

I [Ins. Act A1322: s 8]

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn;

(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquiries to ascertain —

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim;

[4&4A Subs. Act A1322: s 8]

(4B) For the purpose of carrying out his functions under subsection (1 B) or (4A) the Director General —

[Am. Act A1322: s 8]

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement;

[Am. Act A1322: s 8]

(b) may refer to the Director General of Trade Unions for him to ascertain on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

[Am. Act A1322: s 8]

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot:

[Ins. Act A 1322: s 8]

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

[Subs. Act A 1322: s 8]

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union

of employers concerned, as the case may be, as from such date as the Minister may specify;

[Am. Act A 1322: s 8]

(6) A decision of the Minister under subsection (11D) or (5) shall be final and shall not be questioned in any court.

[Am. Act A 718: s. 3] [Am. Act A 1322: s 8J]

[37] The appellant was a member of MAPA until 23 May 2000. The last collective agreement ('CA') dated 1977, ended on 31 December 1999. During the pendency of its membership in MAPA and the pendency of the life span of the last CA both parties are bound by the agreement between them. This issue must be made clear. Insofar as the terms of the last CA are concerned, parties are bound by them and these would be incorporated in the terms of employment implied or express. They are good until the next CA. If new terms are to be had, then negotiations can only be initiated between the appellant and a 'recognised' trade union. The 'recognition' does not run in perpetuity. What does, however, are the terms of the CA *until* they are substituted or amended with a new CA.

[38] In this case, the facts are clear enough. On 18 April 2000, the appellant received a letter from the second respondent (NUPW) requesting for negotiation for *a new CA* to replace the one which expired on 31 December 1999; ie to negotiate terms and conclude collective agreement on wages, terms and conditions of employment of harvesters employed in the plantations owned by the appellant company.

[39] However on 12 June 2000, the appellant wrote to the second respondent (NUPW) rejecting their request to commence collective agreement on the grounds that the appellant *had not* (at that point in time) granted to the second respondent recognition as required under the Industrial Relations Act 1967. In fact there is no evidence that the second respondent had applied to be recognised, as such.

[40] The second respondent demurred, and referred the matter to the Industrial Relations Department for appropriate action (see s 18(1) of the Act).

[41] Though the said department invited parties for a conciliation meeting, the appellant maintained its threshold objection at the meeting.

[42] On 9 September 2000, the appellant received a letter dated 29 August 2000 from the Director-General of Industrial Relations, informing them that

the Minister (the first respondent) had decided to refer the matter as a 'trade dispute', to the industrial court under s 26(2) of the Act for a decision. A

[43] My view is this:

(i) *NUPW lacks legal standing to commence collective bargaining* B

The NUPW has no legal standing in the first place to engage in collective bargaining with the appellant, when it had not first in time, sought recognition under s 9 of the Act.

Recognition is a pre-condition for collective bargaining (see *Dynamic Management Sdn Bhd v Persatuan Pentadbir-Pentadbir Ladang Malaysia Barat* [1981] 2 ILR 237; *Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Bhd v Perbadanan Perkapalan Antarabangsa Malaysia Bhd* [2007] 2 ILR 686). C

(ii) *Minister's decision of referring non-conclusion of collective agreement as 'trade dispute' to Industrial Court, a nullity* D

Secondly, the Minister's decision to refer the 'dispute' between the parties to conclude a collective agreement as a 'trade dispute' is wrong in law and is a nullity. E

[44] There is no evidence whatsoever before the Minister, to suggest that the NUPW had sought or been granted recognition under s 9 of the Act.

[45] The lack of such a prerequisite, renders the NUPW shorn of its legal standing to engage in any act of collective bargaining with the appellant under the Act. Thus any consequent steps taken such as the decision by the Minister to refer the matter as a trade dispute is premature since there can never be such a 'trade dispute' in the absence of proper standing of parties. Thus the Minister's decision is a nullity. F G

In view of the above, the arguments of the respondent and the findings of the learned judge in these records amount to a misdirection.

[46] Much support was sought by the respondents on the past collective agreements between MAPA-NUPW. However it must be noted that those depended upon mutual recognition between MAPA to NUPW and not between the appellant and NUPW. This is because NUPW and MAPA engaged in collective bargaining —based upon the recognition status between themselves as principals (s 9 of the Act). This does not however, translate into 'recognition' as between each member (including the appellant) with NUPW. H I

[47] The past collective agreements were based on the appellant's consent to becoming a member of MAPA — where under r 4A of the MAPA's

A constitution, it could request to be included and be bound by any specific collective agreements that MAPA negotiated with NUPW.

[48] The fact the MAPA acted as principal does not constitute a claim for recognition of or by NUPW or a grant thereof by the appellant.
B

[49] In any event, the past collective agreements entered into during the appellant's tenure of membership in MAPA are not in issue here. They manifest as implied terms into the employee's contract by operation of law
C (s 17 of the Act).

[50] There is nothing in the Act which indicates that the recognition granted between a trade union of employers may automatically be transferred to a member thereof. The Act only allows for the *succession of the terms of*
D *employment* but not the recognition status itself. Section 17(1) of the Act is clear.

[51] Thus the membership of a trade union of employee per se does not
E mean that it automatically grants recognition to a trade union of workmen. Otherwise Parliament would have made express provisions for the same in s 9 or s 13 of the Act as it did in the collective agreement provided in s 17.

F **[52]** There is also nothing in the MAPA-NUPW agreements to suggest that such of the MAPA members had conferred recognition to NUPW or that NUPW had sought recognition from them.

[53] Thus in this appeal, in the absence of an actual claim for recognition
G and the grant thereof by both the second respondent and the appellant respectively, the prerequisite or precedent fact necessary to trigger s 13 does not exist.

H **[54]** The issue before us in this appeal is not concerned with the legal application or the binding effect of the MAPA-NUPW collective agreement after the cessation of the appellant's MAPA membership. Neither is this a situation where the appellant is trying to elude its obligation or breach an existing term of a collective agreement entered into by MAPA-NUPW
I agreement during it tenure of membership.

[55] It must be emphasised that the predecessor agreement which MAPA had entered into with NUPW are not in issue here. *These predecessor agreements also do not provide or give NUPW a future right to engage in*

collective bargaining with the appellant or other MAPA members unless NUPW sought for and is granted recognition from them after their cessation as MAPA members.

[56] In any case, even if the appellant remains a MAPA member, MAPA would be able to represent it for a further collective agreement *only* if the appellant authorised it to do so (see *All Malayan Estate Staff Union v Malayan Producers Association* [1982] CLJ 362; *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Firebricks Sdn Bhd* [1976] 2 MLJ 67).

[57] The learned trial judge had clearly failed to make a distinction between the validity of past agreements within the MAPA framework (which were not in issue) and the current right of NUPW to issue a statutory invitation to commence negotiations under s 13(1) for a fresh collective agreement and to subsequently issue the invitation through the trade dispute process.

[58] Thus whilst the predecessor agreements continue to bind the appellant (see s 17 of the Act), it does not, ipso facto, confer recognition status to NUPW, necessary to vest it with the legal capacity to issue an invitation to engage in collective bargaining to the appellant outside the MAPA framework.

[59] A perusal of Part III of the Act is instructive. Whereas recognition under Part III can only be sought by a union and granted to a union, there is no provision in the act allowing for the recognition prerequisite to be dispensed with.

[60] As a direct consequence of the non-application and non-granting of recognition of NUPW by the appellant, the Minister's decision to refer the 'dispute' over the collective agreement to the industrial court is wholly wrong and is therefore a nullity. Clearly the learned judge failed to comprehend that the non-vesting of recognition to NUPW means that NUPW is precluded from engaging in any collective bargaining and therefore it cannot legally consider the inability of concluding a collective agreement as a 'trade dispute'.

[61] What then is a trade dispute? In the Act, it is defined thus:

> 'trade dispute' means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work or any such workmen.

A So when there is a refusal by the employer to negotiate a collective agreement upon being served with a statutory invitation to commence collective bargaining then the deeming provision in s 13(7) of the Act is triggered. It reads:

B > (7) If after such steps, as aforesaid, have been taken, there is still refusal to commence collective bargaining, a trade dispute shall be deemed to exist upon the matters set out in the invitation.

C **[62]** Only then would such a refusal become a trade dispute. It is only when a dispute between an employer and his workmen, so defined exists that a 'recognised' union may step in and represents the employees in that dispute. In that connection, a union negotiates the agreement as a principal, not as an agent. And a dispute over the refusal to engage in collective bargaining can only become a 'trade dispute' by virtue of the deeming provision in s 13(7) D of the Act (see *Malaysia Shipyard and Engineering Sdn Bhd* TR1–25–31–981).

E **[63]** Thus, in the absence of recognition under s 9 of the Act, a union cannot issue a invitation under s 13(1) of the Act. As a result too, there cannot be a deemed trade dispute under s 13(7) which is capable of being reported under s 18 — which in turn becomes the basis for conciliation under s 18 and reference under s 26(2).

The above clearly evidences the minister's lack of jurisdiction to entertain F NUPW's representation.

In view of the foregoing, I find that this appeal should be allowed. I would accordingly allow this appeal with costs.

Appeal dismissed with costs.

G

Reported by K Nesan

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